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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY HAROLD GRAY,

Defendant and Appellant.

B198996

(Los Angeles County  
Super. Ct. No. BA304429)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Affirmed as modified.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Following a jury trial, defendant Troy Harold Gray was convicted of possession of a controlled substance (Health & Saf. Code, § 11350)<sup>1</sup> and admitted he had previously suffered one prior serious or violent felony conviction under the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and had served five separate prison terms for felonies (§ 667.5, subd. (b)).<sup>2</sup> Thereafter, the trial court sentenced defendant to four years in state prison or double the middle term of two years.<sup>3</sup> In addition to a restitution fine of \$200 (§ 1202.4, subd. (b)), a laboratory fee of \$100 (Health & Saf. Code, § 11372.5, subd. (a)) and a court security fee of \$20 (§ 1465.8, subd. (a)(1)), the court ordered defendant to pay attorney’s fees pursuant to section 987.8 in the amount of \$3,000. A parole revocation fine was imposed and suspended (§ 1202.45).

On appeal, defendant contends, the People acknowledge, and we agree the order directing him to pay attorney’s fees must be stricken, in that the trial court failed to provide him with notice and a hearing as required by section 987.8. We also conclude substantial evidence does not support the court’s implied finding defendant had the ability to pay for all or part of his representation. We strike the order requiring defendant to pay attorney’s fees. In all other respects, the judgment is affirmed.

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<sup>1</sup> The facts of defendant’s crime are not relevant to a resolution of this appeal.

<sup>2</sup> Further statutory references are to the Penal Code, unless otherwise indicated.

<sup>3</sup> The court stayed imposition of sentence on the five one-year prior prison term enhancements.

## DISCUSSION

### 1. *Applicable Law*

An assessment of attorney's fees against a criminal defendant involves the taking of property, triggering constitutional concerns. Due process, therefore, requires that the defendant be afforded notice and a hearing before such a taking occurs. (*People v. Amor* (1974) 12 Cal.3d 20, 29-30; *People v. Phillips* (1994) 25 Cal.App.4th 62, 72.)

Section 987.8 sets forth the statutory procedure for ascertaining a criminal defendant's ability to repay the county for the cost of services rendered by court-appointed counsel. Subdivision (b) of section 987.8 provides that "[i]n any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided."

The notice to be given the defendant must contain "(1) A statement of the cost of the legal assistance provided to the defendant as determined by the court. [¶] (2) The defendant's procedural rights under this section. [¶] (3) The time limit within which the defendant's response is required. [¶] (4) A warning that if the defendant fails to appear before the designated officer, the officer will recommend that the court order the defendant to pay the full cost of the legal assistance provided to him or her." (§ 987.8, subd. (d).)

At the hearing, "the defendant shall be entitled to, but shall not be limited to, all of the following rights: [¶] (1) The right to be heard in person. [¶] (2) The right to present witnesses and other documentary evidence. [¶] (3) The right to confront and

cross-examine adverse witnesses. [¶] (4) The right to have the evidence against him or her disclosed to him or her. [¶] (5) The right to a written statement of the findings of the court.” (§ 987.8, subd. (e).)

In the event “the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability. Failure of a defendant who is not in custody to appear after due notice is a sufficient basis for an order directing the defendant to pay the full cost of the legal assistance determined by the court. The order to pay all or a part of the costs may be enforced in the manner provided for enforcement of money judgments generally but may not be enforced by contempt.” (§ 987.8, subd. (e).)

## ***2. The Trial Court Failed to Comply with the Procedural Safeguards of Section 987.8***

It appears the trial court failed to comply with the provisions of section 987.8. At no time prior to sentencing was defendant given notice he would be afforded a hearing to determine his ability to reimburse the county for the cost of his defense, and no portion of the sentencing hearing addressed defendant’s ability to pay for the cost of his defense. The court simply announced after sentencing defendant that he would be responsible for paying attorney’s fees in the amount of \$296. The court then changed its mind, after reviewing the attorney’s fees schedule, and raised the attorney’s fees to \$3,000, which the court assured defendant was “a discount from the \$8,000 average.” Also absent from the record is any evidence as to the actual amount expended by the county on defendant’s representation. Stated otherwise, the record in this case is completely devoid of any showing of compliance with section 987.8, subdivisions (b), (d) and (e).

## ***3. Substantial Evidence Does Not Support the Implied Finding of Ability to Pay***

There is no substantial evidence to support the implied determination that defendant had the ability to pay. Section 987.8, subdivision (g)(2), defines “ability to

pay” as follows: “‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position. *Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.* [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.” (Italics added.)

Here, defendant was sentenced to state prison for four years. Absent a finding of unusual circumstances, defendant is presumed to be unable to reimburse the trial court for the cost of his defense. The court made no express finding of unusual circumstances, and the record before us discloses no basis for such a finding, and thus under section 987.8, subdivision (g)(2)(B), it could not order defendant to pay attorney fees. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.) As to the other factors to be considered under section 987.8, subdivision (g)(2), the only information in the record concerning defendant’s ability to pay is contained in the probation report, which was prepared in July 2006. The report stated defendant’s present employment, income and assets were unknown, although the report noted defendant had a secondary income from possible drug sales. Also unknown were defendant’s liabilities and marital status and his responsibility for any offspring. The report also reflected defendant’s 20-year criminal history and repeated state prison commitments.

An incarcerated defendant who may be found to have the ability to pay a restitution fine, based on prison wages, may still lack the ability to pay attorney fees. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.) Given the relatively large

amount of attorney's fees imposed under the circumstances (see, e.g., *People v. Flores* (2003) 30 Cal.4th 1059, 1062 [\$5,000 in attorney fees]; *People v. Lopez, supra*, 129 Cal.App.4th at p. 1536 [\$1,000 in attorney fees]; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1392 [\$800 in attorney fees]), we find in accordance with the governing statute that there was no substantial evidence to support the order.

**4. *This is not an appropriate case for remand***

The question remaining is whether this is an appropriate case for remand. Defendant contends it would be “a waste of judicial resources due to the obvious conclusion that he has no ability to pay” to remand for further proceedings. Unlike *People v. Flores, supra*, 30 Cal.4th 1059 in which the California Supreme Court concluded that “a showing of unusual circumstances was conceivable” because the probation report stated that the defendant possessed a substantial amount of jewelry at the time of sentencing (*id.* at p. 1068), there is nothing in the record suggesting that a showing of unusual circumstances is conceivable here. Judicial economy compels us to strike the order imposing attorney's fees.

**DISPOSITION**

The order imposing \$3,000 in attorney's fees is stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.